APPEAL NO. 022348
FILED OCTOBER 31, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 21, 2002. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on September 7, 2001, with an impairment rating (IR) of 8%, as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant argues that the hearing officer erred in giving presumptive weight to the designated doctor's report, primarily because the designated doctor stated in the narrative report accompanying his Report of Medical Evaluation (TWCC-69) that he did not have the claimant's medical records. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. On April 9, 2001, Dr. S, a doctor to whom the claimant was referred by his treating doctor, examined the claimant for the purpose of determining MMI and IR. In a TWCC-69 dated April 13, 2001, Dr. S certified that the claimant reached MMI on April 9, 2001, with an IR of 12%. The claimant disputed Dr. S's rating and Dr. M was selected by the Commission to serve as the designated doctor. Dr. M examined the claimant on September 7, 2001, and in a TWCC-69 dated September 11, 2001, certified that the claimant reached MMI on September 7, 2001, with an IR of 8%. In the narrative report accompanying his TWCC-69, Dr. M stated "[n]o records were made available at the time of the examination. I do not have an MRI record, his operative reports or any kind of information available." However, at the end of his narrative report, there is a list entitled "Summary of Records" which lists records that appear to correspond to the claimant's medical records. A letter of clarification was sent to the designated doctor forwarding the concerns of the claimant's treating doctor, and specifically raising the concern that the designated doctor did not have the claimant's medical records at the time of his examination. In the relevant portion of his response to the letter of clarification, Dr. M stated "[a]s you know, I saw the examinee on September 7, 2001, and performed the examination. At that time, his range of motion and x-rays and MRIs were reviewed and an [IR] was performed on those findings." It is important to note that the designated doctor does not mention reviewing the claimant's operative reports in his response. In addition, the designated doctor states that he reviewed x-rays and the record before us does not reference any x-rays.

At the hearing, the claimant testified that the designated doctor only gave him a cursory examination on September 7, 2001, and that the designated doctor told him that his examination would be rescheduled after the designated doctor received the

claimant's medical records. In addressing this concern, the hearing officer stated that "[t]his testimony was in conflict with the [designated doctor's] report and was not credible." We cannot agree that the testimony was in conflict with the designated doctor's report, given the designated doctor's affirmative statement that "[n]o records were made available at the time of the examination. I do not have an MRI record, his operative reports or any kind of information available." It has long been recognized that the 1989 Act and the Commission's rules require that the designated doctor conduct an examination of the claimant and review the claimant's medical records. See Texas Workers' Compensation Commission Appeal No. 002154, decided October 30, 2000; Texas Workers' Compensation Commission Appeal No. 971733, decided October 20, 1997; and Texas Workers' Compensation Commission Appeal No. 962282, decided December 23, 1998. Indeed, the version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(h) (Rule 130.6(h))[1] applicable in this case, establishes that the treating doctor and the carrier are responsible for sending the employee's medial records to the designated doctor. In addition, Rule 130.1(b)(4)(A) and 130.1(c)(3) specifically require that the certifying doctor, including the designated doctor, review the medical records before certifying an MMI date and assigning an IR. Based upon Dr. M's affirmative statement in his narrative report that he did not have the medical records, a significant question exists as to whether the designated doctor reviewed the claimant's medical records in this instance. While the "Summary of Records" and the response to the request for clarification tend to suggest that the designated doctor reviewed some medical records, they do not provide sufficient assurance that the records were available to the designated doctor to overcome the designated doctor's explicit statement that he did not have the records to review. Accordingly, we remand this case so that the claimant's medical records can be sent to the designated doctor and he can determine the effect of those records on his certification of MMI and IR. In addition, the designated doctor should be asked if it is necessary for him to reexamine the claimant. If the designated doctor states that a reexamination is not needed, he should be asked to provide an explanation for that decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

[1] The provision that requires the treating doctor and the carrier to provide medical records to the designated doctor is now contained in Rule 130.5(d)(3).

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GARY SUDOL
12222 MERIT DRIVE
DALLAS, TEXAS 75251.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Margaret L. Turner
Appeals Judge